Waiver and Conduct:

In view of the conclusions that I have come to on the two main questions I do not think it is therefore necessary for me to consider in detail the other issues submitted by the learned State Attorney-General, namely, on the question of waiver and conduct of an applicant in relation to a grant of an Order of *Certiorari*. Suffice to say that the admission of the respondents on the invalidity of the revocation of the said Licence for reasons stated thereof has weakened considerably the argument of the learned State Attorney-General.

Costs:

I now come to the question of costs. I must state that this issue has made me ponder as to where fairness lies. On the one hand the applicant can be said to have succeeded as the respondents have made the admission. On the other hand no Order of *Certiorari* is granted for the reasons stated hereinabove. But these two factors deserve consideration, namely:

(a) no explanation from both sides as to why nothing was done to this case even after the decision of the Supreme Court in *Minister of Resource Planning & Ors. v. Keruntum Sdn. Bhd. (supra)*; and

(b) it is not within the sole control of the applicant to have the hearing of this application heard before the expiry of the said Licence. Learned Counsel for the applicant says that several requests were made to have this application heard before the expiry of the said Licence.

Accordingly I think the fair thing to do in the circumstances is that in the exercise of my discretion I make no order as to costs. This application of the applicant is therefore dismissed with no order as to costs.

ESTET PEKEBUN KECIL SDN. BHD.

v.

SYKT. SIN KIAN FATT ENTERPRISE SDN. BHD.

HIGH COURT, JOHORE BAHRU
DATO' HJ. ABU MANSOR BIN ALI J.
[CIVIL SUIT NO. 284 OF 1984]
14 DECEMBER 1992

CONTRACT: Agreement for sale and purchase of palm oil fruits - Accord and satisfaction - Set-off - Counterclaim for payments wrongly made - Allegation of trading in palm oil without a licence.

The plaintiffs claimed for payments due on various quantities of palm oil fruits and kernel sold to the defendants for which payments had not been made amounting to RM251,983.64.

The defendants set up the defence of accord and satisfaction and claimed that the plaintiffs had accepted a lesser amount in satisfaction of the debt. The defendants also counterclaimed for payments wrongly made and/or over-payment. The defendants also alleged that the plaintiffs were trading in palm oil without a licence.

Held:

[1] There was no accord and satisfaction. The account compiled by the defendants was received by the plaintiffs in order to enable the accounts department of the plaintiffs to verify the same and not as satisfaction of the amount actually owing.

[2] The defendants had been consistently paying the demands of the plaintiffs in accordance with the terms "mengikut harga PORLA" which is a well known term in the palm oil industry and there were no grounds for the defendants to refuse to pay.

[3] The evidence showed that the plaintiffs were in fact in possession of a licence to trade in palm oil at the material time.

[Plaintiffs claim allowed with costs. Defendants counterclaim dismissed with costs].

Legislation referred to:
RISDA Act 1972, s. 6(2) (b), (c)

For the plaintiff - Dulip Singh; M/s. Dulip Singh & Co.
For the defendant - Bernatt; M/s. S.T. Lee & Partners

JUDGMENT

Hj. Abu Mansor bin Ali J:

By letter dated 27 May 1982 the plaintiffs agreed to sell and the defendants agreed to purchase from the plaintiffs from time to time various quantities of palm oil fruits and kernel and to take delivery of same from the plaintiff's estate at Ulu Keratong Tiga upon the agreed terms as to price and conditions stated therein. Pursuant to the said agreement of that date the plaintiffs sold and the defendants took deliveries from time to time from the plaintiff's said estate between April 1982 and February 1983 various quantities of palm oil and kernel of which full particulars had been rendered to the defendants and the defendants have settled and or paid all monies due to the plaintiffs for same up to February 1983.

The plaintiffs averred that the defendants have, however, wilfully failed and or refused to pay the plaintiffs for the various quantities of palm oil fruits and kernel sold by the plaintiffs between March 1983 and May 1983 - less agreed processing and transport costs, full particulars whereof had been rendered to the defendants. The plaintiff's claims are briefly particularised as follows:

Particulars

Month	Quantity	Price	Amount due
(a) March 1983	914.15 m/tons	@ RM75.59 per m/ton	= RM69,100.60
(b) April 1983	1096.39 m/tons	@ RM89.36 per m/ton	= RM97,973.41
(c) May 1983	1047.60 m/tons	@ RM101.87 per m/ton	= RM106.719.01
		Total :	RM273,793.02
		Less payment received :	RM21,809.39
		Balance due :	RM251,983.64

The plaintiffs further averred that inspite of repeated demands made the defendants have wilfully failed and or refused to settle the balance of RM251,983.64 or any part thereof. So the plaintiffs pray for judgment for the balance and interest at 8% p.a. from 1 June 1983 to realisation and costs.

The defendants first filed their defence on 28 June 1984. On 5 December 1990 the defendants were allowed to amend their statement of defence. The plaintiffs replied to the amended statement on 14 December 1990 averring that the letter dated 27 May 1982 was not void for uncertainty and it referred to letter dated 18 March 1982. The plaintiffs denied there was accord by the defendants and still maintain the defendants wilfully failed to settle the claim for fruits bought for the stated period. With regard to para 5 of the said amended statement of defence the plaintiffs admitted receipt of all monies due up to end of February 1983 in accordance with the terms of the said letter of 27 May 1982 with full licence to sell fruits from their estates and denying that the defendants are entitled to make any deductions they alleged they are entitled to. The plaintiffs also denied receiving the letters dated 29 June 1981, 12 August 1981, 10 March 1982, 1 June 1982, 28 July 1982 and 25 November 1982 which letters are, the plaintiffs alleged, fabricated by the defendant's servant or representative named Fung Fwei Chong, DW9 and the plaintiff's former employee one Bahari b. Derani, DW4 who had been dismissed. The plaintiffs also alleged the two named persons have also conspired to defraud the plaintiffs. The plaintiffs denied that the defendants have a right of set-off.

The defendants applied for the second time on 28 April 1991 to amend their earlier statement of defence filed on 13 December 1990 and for the first time in this Court also brought in a counterclaim in the midst of trial. Their application was granted on 28 April 1991 and it was re-dated 4 May 1991. The plaintiffs acting on the draft of Amended Statement of Defence to be applied for on 28 April 1991 filed a reply to it dated 29 April 1991 (but unfortunately the defence did not file the amended defence and counterclaim on 28 April 1991). On 6 May 1991 the plaintiff then replied to the defence and the counterclaim.

The plaintiff's reply of 29 April 1991 repeated the earlier grounds already pleaded in plaintiff's statement of defence to the defendant's counterclaim, the plaintiffs pleaded in para 11(a) with regard to para 11 of the Re-amended Statement of Defence the plaintiffs admit, save to the extent, that the plaintiff had by their letter dated 18 March 1982 taken over the management of the sales of FFB of oil palm in accordance with the terms therein and nothing more and put the defendants to strict proof of the rest of the matters. The plaintiffs also contend that at all material times the Yayasan Pekebun Kecil Getah Risda was not an independent contractor but was a unit established in the Rubber Industry

Smallholders Development Authority (RISDA) and the unit was managing the several estates and plantations of RISDA.

In para 12 of the plaintiff's reply the plaintiffs averred they lawfully received the various payments from the defendants for purchase of FFB from estates belonging to RISDA and the rest of the matters in paras 13, 14, 15 and 16 of the counterclaim are denied. The plaintiffs denied that the defendants are entitled to repayments for reasons already stated and plaintiffs further averred there is no merit in the defendant's counterclaim. The plaintiffs further averred that the defendant's counterclaim was invalid and unenforceable due to limitation and also *res judicata* as the defendant's claim for RM420,929.92 against the plaintiffs was dismissed by the Muar High Court in Civil Suit No. 22(23)96-89.

In the defendant's reply to the plaintiff's defence to the counterclaim the defendants contend that the averments of the plaintiffs in the reply to the Re-amended statement of defence dated 29 April 1991 relying on Limitation Act 1953 and also relying on fraud or connivance should be struck out as they were not raised by the plaintiffs in 1984, when the documents were then disclosed (enclosure (12) and (13) and therefore such defence of fraud or connivance is not now available to the plaintiffs.

The defendants averred that, in accordance with the evidence given by the plaintiffs *vide* P 22 and P 23 Yayasan Pekebun Kecil Getah Risda was an independent contractor. They further contend that neither the independent contractor nor the unit under RISDA existed.

In para 4 of the defendant's reply to the plaintiff's reply to the defence to the counterclaim the defendants contend that the plaintiffs contracted with the defendants as principal and not as agent and the plaintiffs are not entitled to the sums paid by the defendants. The defendants will also aver they had no dealings with RISDA.

The defendants averred that the counterclaim of the defendants is not affected by *res judicata* as the defendants made no claim in Muar Suit No. 22(23) 96 of 1989 (the Muar Suit) and the Muar Suit was not between the same present parties.

The defendants in para 7 of their reply contend that Yayasan Pekebun Kecil Risda was not an entity. In para 8 they contend that the plaintiffs are in contravention of RISDA Act 1972 s. 6(2) (c) since the plaintiffs by letter dated 18 March 1982 did not state it was carrying out activities beneficial to the smallholders and neither has it legal status under the RISDA Act not having been gazetted as a corporation under s. 6(2) (b).

The defendants had by letters requested the plaintiffs to repay but they had not replied to their letters. The defendants therefore pray that the plaintiff's reply to the counterclaim be struck out.

The defendants have had a long peaceful relationship as buyer of palm oil fruit (FFB) from RISDA either firstly through Yayasan, a unit of RISDA and then Estate Pekebun Kecil Sdn. Bhd. (ESPEK) the present plaintiffs.

The defendants in their defence did not deny buying and taking delivery of the fruits from estet Ulu Keratong 3 but the defendants in their defence try to make out that there was payment of RM420,979.29 and that amounted to accord and satisfaction. Whereas the plaintiffs denied there was any accord and satisfaction.

The amount of their claim is as per their claim.

The Court's approach to this claim, on the balance of probabilities are as follows:

(i) if the defendants can prove that there was in fact accord and satisfaction then the plaintiffs' claim fails;

(ii) if the plea of accord and satisfaction fails it is still encumbent on the Court to weigh whether on the balance of probabilities the plaintiffs have proved their case and how much of such claim is affected by the counterclaim. If the counterclaim fails then the plaintiffs are entitled to judgment.

On the first issue whether there was accord and satisfaction of that claim, the defendant's evidence of this state of affairs was the allegation that the defendant's Managing Director Mr. Fung Fwei Chong (DW9), together with his friend, Teo Joon Kian (DW1), went to see Tuan Osman Said (PW1) who was then the Managing Director of the plaintiff's on the 10 June 1983. DW9 saw first the plaintiffs' Marketing Manager Noor Faadi to whom he explained the accounts. Noor Faadi said he had to consult Encik Osman Said whom he phoned and he then took both DW9, Teo (DW1) to see Osman Said.

According to the defence version DW1, DW9 then explained the statement of account to Osman Said. DW9 told him "this is my final statement of account. If you could accept, I will give you a cheque in settlement". According to Mr. Fung (DW9) he then issued a cheque. DW9 promised to post the original. DW1 confirmed he saw DW9 write something behind the cheque. According to the defence Osman was happy to see the alleged settlement.

The story of DW9 that he came to see him and settled the account with the cheque was denied by Encik Osman Said (PW1). Assuming the story of DW9 was true that there was indeed accord and satisfaction it has not got the ring of truth. I pose the question would PW1 allow DW9 and DW1 who came with a statement of account, approve it there and then and demanded for the cheque and said all right we are happy with the settlement? Would PW1 say we confirm it is a settlement? The more probable of the versions would have been for any prudent manager to see whether the account is correct; he can still accept the cheque but the acceptance is subject to verification by his accounts department and if there was to be any adjustment it would be done later. After all the plaintiffs and defendants were enjoying a good relationship. In fact the conduct of the Marketing Manager explained everything - he was full of reservation and he had to consult his superiors Encik Osman Said first. This was what transpired.

The version of Encik Osman Said was more consistent with truth. He was Managing Director of a large concern and DW9 and Ulu Keratong 3 was not his only concern. He said he received the account and passed it to his accounts department to check. No Manager in his right mind would be willing to pass the account there and then and accept the alleged settlement in the form of the cheque for RM21,809.38.

Having considered the two versions anxiously I cannot accept there was accord and satisfaction in this matter and I reject the defendant's version as an untruth and hold there was no accord and satisfaction.

I go now to the issue it would still be incumbent on the plaintiffs to prove their claim, on the balance of probabilities, and how much of that is affected by the counterclaim, if any.

The plaintiffs' claim is based on fresh fruits supplied at a certain price or agreed formula. The defendants agreed to pay for that price and it became a pattern of conduct of the defendants in all previous dealings to settle the fruits sold on a delivered basis and not ex-mill based on the price declared by PORLA. The contract between the plaintiffs was a 'carry over' of the earlier contract between RISDA, represented by one of its unincorporated units called Yayasan with the defendants way back since 1981 and somewhere before this non-payment of balance sums for the months March 1983 to May 1983 for RM251,983.64, there was formed a company limited, a subsidiary of RISDA to manage RISDA's vast estates.

The price of fresh fruit bunches (FFB) known to the palm oil industry was too well known to need exhaustive elaboration - which was "mengikut harga PORLA" which all and sundry, in the palm oil industry, follow and assuming it was unknown, the parties to the contracts of RISDA and the defendants, through Yayasan, and later between the plaintiffs representing RISDA and the defendants the terms "mengikut harga PORLA" did not represent any difficulty between the parties. Even if it was uncertain in the past both parties knew how to apply the formula "mengikut harga PORLA". It was noted during this trial that when the witnesses for the plaintiffs gave evidence it is given that "mengikut harga PORLA" is certain and if it is the defence witnesses gave evidence it is uncertain. What cannot be denied is that and I make that finding the parties in the earlier contracts and the present relevant contracts had no problem in applying the formula "mengikut harga PORLA".

I accept the evidence that "mengikut harga PORLA" is a well known term in the oil palm industry. It is applied by making 4 deductions from the price declared by PORLA and it is on delivered basis and not ex-mill. This is confirmed by Mr. Fung Fwei Chong, DW9 himself in the early part of his evidence. The earlier contract between RISDA (Yayasan) and the defendant began in June 1981. Then the history of the parties' relationship was a result of letter of contract P 24 dated 18 March 1982. The old manner of calculating the FFB prices continued as a trading system had already evolved between the parties. It was in evidence that the Marketing Manager would just give the defendants manager the PORLA price by phone and the defendants would pay. The PORLA price could be obtained by Encik Bahari b. Derani (DW4) from the plantation section of RISDA. I accept as

a fact that the plaintiffs' contract that governed their relationship is document P 24 dated 18 March 1982 and in doing so I reject the evidence of the defence that their relationship was governed by the following documents:

(i) D13 dated 29 June 1981;
(ii) D10 dated 12 August 1981;
(iii) D21 dated 10 March 1982.

The above documents were prepared by the defence, in circumstances that are only favourable to the defence. Document (i) above used by the defence, allegedly alluded to a discussion where it was allegedly agreed that the price of CPO ex-crude palm oil mill (rather than delivered) basis during the delivery month. Bahari b. Derani (DW4) when giving evidence on 20 February 1990 and 21 February 1990 admitted, when asked by Court if para 2 p. 1 of D10 was a mistake, DW4 had no answer and later he said he agreed to the formula contained in D10. As to why he did not give a proper reply though he signed D10, he said he was busy. DW4 could not say if there was urgency that he signed agreeing to it in a letter prepared on defendant's letter pad. Similarly in letter D10, DW4 also signed where it talked of poor quality of fruits. Then later on DW4 made the damning statement (page 6(1)) "I was wrong in confirming without checking". Then by D11 DW4 appeared to have agreed to vary the terms of the contract whereas the terms in D7 are different from D11. DW4 also said para 1(a) of D11 was not correct. DW4 then confirmed at page 7(iii) "In D11 para (d) ex-crude palm oil mill - I agree it was a mistake. It should be delivered basis".

DW4's evidence a regards D12 deduction from producer was wrong. It was miller to pay. As regards the alleged deduction the defendants paid without any deduction nor did they object.

The true circumstances of the signing of D10, D11, D12, D13 and P 27 were revealed and explained by DW4. He said "they were brought to my office by Mr. Fung (DW9) and I signed them. I never replied on my company's letter-head." It is also relevant to note PW1 Osman denied he agreed to the various deductions in the above documents as alleged.

It was clear to the Court that the '*modus operandi*', so called, adopted by this Mr. Fung (DW9) is to spring the accounts, cheque or letters like D10, D11, D12, D13 and P 27 to his intended 'victim' and before they could realise where they were, he has made them sign. This could be said to have happened when he handed the copy of the statement of account to En. Noor Faadi, the Marketing Manager and in a similar manner this happened to DW4.

Apart from document P 24 which terminated the earlier contract the document that reflected the true contract of the parties I found, was exhibit P 26 dated 14 April 1982 which was a tender, submitted by DW9, and signed by him setting out the terms for the future purchase of FFB by the defendants. At P 36 DW9 admitted that "I agree that what I said PORLA price in D7, is PORLA price, as delivered basis not ex-mill. In all these harga minyak PORLA is delivered basis - and not ex-mill".

I make a finding of fact based on past and the relevant conduct of the parties that from that date of P 24 and P 26 the claim was a genuine claim and the fact that the defendants had been consistently paying the demand of the plaintiffs in accordance with the contract it is no defence for defendants to refuse to pay.

Counterclaim

As for the defendant's alleged counterclaim I dismiss it as it was an invalid claim. If it was based on the allegation of the payments having been wrongly received; it does not hold water because payment was in fact made to Yayasan (a unit of RISDA) and was therefore payment to RISDA whose estate Ulu Keratong 3 was the property of RISDA from where the defendants bought the FFB.

If the counterclaim was based on over-payment equally it was also an invalid claim because the defendants promptly paid all the dues under the contract in respect of the purchase of FFB from 1 May 1982 to 28 February 1983 without any deductions whatsoever. If the defendants were trying to vary the contract on their own, it was a unilateral attempt by them to vary a term of contract which they had by conduct abided and faithfully followed through regular payments. For reasons given I dismiss this counterclaim and in this regard I reject the statement of the defendants that they had paid the plaintiff's claim since there was no over-payments as alleged. I make a finding there was no over-payment.

Licence

I need only deal with the allegation that the plaintiffs was trading in palm oil without a licence. The defence called the PORLA officer,

Mr. Sivanesan (DW5). He testified that RISDA is the owner of 21 estates and Ulu Keratong 3 is one of them. RISDA holds licence No. 0631 and kept at their Ampang Head Office. He said in November 1982 Estate Pekebun Kecil (plaintiff) had a licence to sell oil palm FFB in these 21 estates - including Ulu Keratong 3. I accept DW5's evidence that the plaintiffs had a licence to trade in oil palm fruits.

My decision is on the totality of the evidence adduced I believed and accept the claim of the plaintiffs as genuine and it was not in anyway affected by the alleged counterclaim. I enter judgment for the plaintiffs with costs to be taxed and also allow the plaintiff's costs on the dismissed counterclaim as prayed.

LIM CHUAN CHENG

v.

TOU SII KEH

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG J.
[SUIT NO. 46 OF 1985]
18 JANUARY 1993

CONTRACT: Development agreement - Breach by defendant - Non-compliance with time limits prescribed by agreement - Waiver by plaintiff - Time subsequently made of the essence of the contract - Non-compliance with new time limits by defendant - Rescission of agreement after notice by plaintiff - Whether notice reasonable - Whether rescission valid - Whether plaintiff entitled to recover damages for breach of agreement.

The plaintiff and the defendant entered into an agreement whereby the plaintiff agreed to convey to the defendant at least 2 units of shophouses to be built on the subdivided lots mutated from the land owned by the plaintiff in return for which the defendant agreed to develop the said land in accordance with the covenants and conditions contained in the agreement.

One of the conditions was that the defendant was to get approval for the subdivision of the land from the Lands & Surveys, Sibu. The application for subdivision was approved in principle around 25 February 1981, but it was only in relation to 4 units of 3 storey shophouses instead of 4 units of 4 storey shophouses contemplated in the agreement.

Consequently the plaintiff and the defendant entered into a supplementary agreement on 19 June 1981 whereby the defendant agreed, *inter alia*, to obtain approval of the relevant building and engineering plans within 5 months from the said date.

On the defendants failure to comply with the said terms, the plaintiff on 13 September 1984 gave 3 months notice to the defendant requiring compliance and after the lapse of the notice period rescinded the agreement and claimed damages.

The defendant disputed the validity of the rescission contending that by his acts the plaintiff had waived any reliance on the time frame provided for under the supplementary agreement.